

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**SCZ/8/2/270/2013**

BETWEEN:

**COSMAS MPAMPI**  
**REGINA MPAMPI**

**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL STAVIO MORELI**  
**GINO MORELI**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

**Coram: Hamaundu, Mutuna and Chinyama, JJS**  
**On the 26<sup>th</sup> October, 2016 and 22<sup>nd</sup> December, 2016**

For the Appellants : Mr J. Zimba, Messrs Makebi Zulu Advocates  
 For the Respondent : Mr D.B. Mupeta, Messrs D.B. Mupeta & Co

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**JUDGMENT**

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**Hamaundu, JS, delivered the Judgment of the Court.**

This is a motion by the respondents to dismiss the appellants' appeal pursuant to **Rules 48 (5) and 55** of the **Supreme Court Rules, Cap 25** of the **Laws of Zambia**, for want of prosecution.

The facts leading to this motion are these:

The appellants had filed a notice of appeal against a decision of the High Court. Thereafter, the appellants ought to have filed their record of appeal within sixty days. The appellants defaulted. Upon application, they were granted a further sixty days in which to file the record of appeal. The period was to expire on the 8<sup>th</sup> May, 2015. About a month or two after that date had passed, the respondents had not yet been served with the record of appeal. When the respondent's advocate started preparing to file an application to dismiss the appeal for want of prosecution, he was shown by registry staff the record of appeal stamped for the 8<sup>th</sup> May, 2015.

The respondents have exhibited an extract of the Appeals Register, a copy of the filed record of appeal and the receipt issued with respect to the filing of the record in order to show that the appellants' record of appeal was filed out of time and irregularly.

Although we received arguments on this application, we find it unnecessary to consider them because the success or failure of this motion hinges entirely on issues of fact. We shall, therefore, merely



resolve the disputed issues of fact from the affidavits of the parties and the exhibits filed.

Counsel for the respondents averred in his affidavit as follows;

- (a) that he was expecting the appellants' record of appeal to have been filed by the 8<sup>th</sup> May, 2015;
- (b) that throughout the month of May, 2015, the appellants did not serve the record of appeal, prompting him to send one of his staff, on 22<sup>nd</sup> June, 2015, to file an application to dismiss the appeal for want of prosecution;
- (c) that a member of the registry staff refused to file the application, claiming that there was an application for non-joinder on the record; a follow-up by counsel on the 1<sup>st</sup> July, 2015 was met with the same explanation;
- (d) that on the 24<sup>th</sup> July, 2015, counsel went back to the Registry with his application and demanded a search on the record, only to be shown the record of appeal stamped 8<sup>th</sup> May, 2015.

In her affidavit, the 2<sup>nd</sup> appellant averred as follows;

- (a) that the record of appeal was presented at the Registry for filing on the 7<sup>th</sup> May, 2016 but was inadvertently not stamped on that day; the omission was only discovered on the 8<sup>th</sup> May, 2016 whereupon the record was stamped;
- (b) that the receipt was not immediately issued because the custodian of the receipt book was not in the office

Those were the two contesting positions as far as facts are concerned.

We have examined the extract of the Appeals Register on which the appellants' appeal was entered and wish to make the following observations: First, the appeal was numbered 66A and was indicated as having been lodged on the 7<sup>th</sup> May, 2015. Secondly, the general layout of the register showed that a space was left between the entries of the appeals both above and below each appeal; the appellants appeal was the only one that was **"squeezed"** in the gap between appeal numbers 66 and 67 and was given number 66A; Thirdly, in the whole register, the appellants' appeal is the only one that has a number suffixed by a letter. The rest have plain numbers.

Clearly, there is something amiss with the entry regarding the appellants' appeal. We further wish to note that the receipt for the lodging of the appeal is dated the 18<sup>th</sup> June, 2015. We are mindful of the appellants' explanation that on the day of lodging, that is, the 8<sup>th</sup> May, 2015, the cashier was not there. However we fail to understand how the receipt came to be issued more than a month later. The appellants have not given an explanation for that either. Finally, we wonder, if indeed the record of appeal was lodged on the



8<sup>th</sup> May, 2015, why it was not served on the respondents. All these inconsistencies go to show that the record of appeal was not presented at the registry for filing on the 7<sup>th</sup> May, 2015 or 8<sup>th</sup> May, 2015, as claimed by the appellants. What becomes clear is that the record was presented long after the period granted to the appellants had expired. That is why it was **"squeezed"** in a space in the register that should have been left blank. That is why it was given a number that did not exist. Therefore, we find as a fact that the record of appeal herein was filed well out of time and irregularly, since no further leave to file it out of time was sought by the appellants. In the circumstances, there is no record of appeal on the record that was regularly filed.

Therefore, the respondents are on firm ground in moving a motion to dismiss this appeal. It remains for us to decide whether to dismiss the appeal or make some other order.

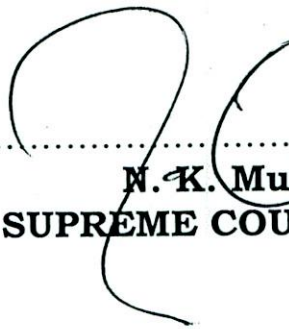
We have noted that the appellants had initially defaulted but were granted an extension of sixty days. The appellants failed to meet that extended deadline. There is no explanation given by them for

their failure. Therefore, we are left with no choice but to dismiss the appeal.

This appeal shall stand dismissed for want of prosecution. We award costs to the respondents.



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**E. M. Hamaundu**  
**SUPREME COURT JUDGE**



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**N. K. Mutuna**  
**SUPREME COURT JUDGE**



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**J. Chinyama**  
**SUPREME COURT JUDGE**